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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 548

HARRY RENTON BRIDGES, HENRY SCHMIDT, and J. R. ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 6, 1952, as amended November 18, 1952.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California (hereinafter referred to as the "trial court") denying motions to dismiss the indictment is reported at 86 F. Supp. 922; its opinion overruling objections to the introduction of certain evidence is reported at 87 F. Supp. 14; its opinion upon the revocation of bail for petitioner Bridges pending his appeal to the Court of Appeals is reported at 93 F. Supp. 989.[1] The opinion of the Court of

[1] The opinion of the trial court rendered on the Government's motion to stay proceedings in a pending civil denaturalization suit is reported at 86 F. Supp. 931.

Appeals for the Ninth Circuit vacating and setting aside the order revoking the bail of petitioner Bridges is reported at 184 F. 2d 881. The amended opinion of the Court of Appeals for the Ninth Circuit affirming the judgment below has not yet been officially reported; it is printed at Tr. 8354-8433.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1952. The order of the Court of Appeals denying petitioners' timely petition for rehearing, and its amended opinion, were entered on November 18, 1952. On November 28, 1952, Mr. Justice Douglas entered an order extending the time for filing a petition for certiorari to January 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Circuit Court of Appeals for the Ninth Circuit affirmed a judgment of the District Court of the United States for the Northern District of California, entered upon jury verdicts under a three-count indictment, finding petitioner Bridges guilty of making a false statement in his naturalization proceeding, finding the other two petitioners guilty of participating in procuring Bridges' naturalization certificate by fraud, and finding all three petitioners guilty of conspiring to defraud the United States by having Bridges make the false statement. The alleged falsity of the statement, or the alleged fraud, under each count, turned upon whether petitioner Bridges had ever been a member of the Communist Party. The questions are:

(1) Whether, in view of prior adjudications (including the determination of this Court in *Bridges* v. *Wixon*, 326 U. S. 135), this proceeding is barred, in whole or in part, by the principles of *res judicata*, or estoppel, or the due process clause of the Fifth Amendment.

(2) Whether this proceeding is barred by the statute of limitations.

(3) Whether, in four particular and important respects, petitioners were denied a fair trial.

STATUTES INVOLVED

The relevant provisions of (a) 18 U. S. C. 371, on which Count I of the indictment is based; (b) 18 U. S. C. 1015(a), on which Count II is based, (c) 8 U. S. C. [1946 ed.] 746(a), on which Count III is based, (d) 18 U. S. C. 3282, the applicable statute of limitations, and (e) 18 U. S. C. 3287, the Wartime Suspension Act, are set forth in the Appendix, *infra*, pp. 24-25.

STATEMENT

Harry R. Bridges has resided continuously in the United States since 1920, when he entered legally as an immigrant seaman from Australia (Tr. 43). He was naturalized on September 17, 1945. His wife and his children are native-born American citizens. He is the President, and the other petitioners are or have been officers, of the International Longshoremen's and Warehousemen's Union.

From 1934 to 1945, Bridges was the subject of investigations and proceedings designed to deport him on the

ground that he was or had been a member of the Communist Party. These were unsuccessful, and on June 23, 1945 (five days after the decision in *Bridges* v. *Wixon*, *supra*), Bridges filed at the San Francisco office of the Immigration and Naturalization Service his petition for naturalization. On August 8, 1945, he appeared before an examiner in connection with this petition; Schmidt and Robertson also appeared and witnessed the petition.[2]

On September 17, 1945, Bridges, with the same two witnesses, appeared in the Superior Court of the State of California, and testimony was taken in support of the petition. The witnesses testified that they were American citizens, that they had known Bridges for five years and knew him to be of good moral character; they vouched for his loyalty to the United States and recommended him to citizenship (Tr. 134-135).[3] Government counsel stated that the witnesses were satisfactory, and they were excused. Bridges was then examined. The following was among many questions to and answers by him (Tr. 138):

> "Q. Do you now or have you ever belonged to the Communist Party in the United States?
> A. I have not, I do not."

Thereafter, Government counsel stated that he had no further evidence and no objection to naturalization (Tr. 144).

On May 25, 1949, three years, eight months, and eight days after the naturalization decree, this indictment (Tr.

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[2]Robertson was called at the last minute in place of a prospective witness whose citizenship qualifications were not established to the satisfaction of the examiner (Tr. 459-461).

[3]It is not alleged in the indictment herein, nor did the Government offer any proof at the trial, that any of these statements were false.

3-8) was filed. The fraud charge in Count I was that Bridges' testimony was false, in that he allegedly had been a member of the Communist Party from 1933 to September 17, 1945. The overt acts alleged to ground the conspiracy were the several steps of the naturalization proceeding. Count II of the indictment alleged that the question put to petitioner was material and his falsehood willful. Count III charged that Schmidt and Robertson assisted Bridges to obtain a certificate of naturalization, knowing it to have been procured by fraud.

After the indictment was returned, Bridges moved its dismissal (Tr. 10-26) on grounds which included all the issues embraced in the first two questions presented here.[4] Petitioners Schmidt and Robertson moved to dismiss on such of the foregoing grounds as were applicable to them (Tr. 27-41, 8312). The motions to dismiss were denied. *United States* v. *Bridges*, 86 F. Supp. 922.

After a long trial, the jury returned verdicts of guilty against Bridges on Counts I and II of the indictment, and against Schmidt and Robertson on Counts I and III of the indictment (Tr. 220-222). Motions in arrest of judgment and for new trial were duly made (Tr. 223-228). All were denied (Tr. 229), and Bridges was sentenced to concurrent terms of two years on Count I and five years on Count II (Tr. 230, 235-236). Schmidt and Robertson were each sentenced to concurrent terms of two years on Counts I and III of the indictment (Tr. 231-234, 237-240).

Ten weeks later, the Government moved to revoke the order granting bail to Bridges, and to remand him to the custody of the Marshal. Over objection, and despite the Government's admission that the appeal presented sub-

[4] *Supra*, p. 3.

stantial questions, Bridges was incarcerated in the San Francisco County Jail (93 F. Supp. 989). Three weeks later he was released by order of the Court of Appeals. *Bridges* v. *United States*, 184 F. 2d 881.

Appeals from the judgment of conviction were timely filed to the Court of Appeals for the Ninth Circuit, which affirmed it on September 6, 1952. A petition for rehearing was denied, on the basis of an amended opinion, on November 18, 1952. A supplemental petition, reiterating the request for a hearing before the Court of Appeals *en banc*, was denied with a further opinion on December 29, 1952.[5]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred;

(1) In holding that the indictment was not barred, in whole or in part, by prior adjudications, under the principles of *res judicata* or estoppel, or under the Fifth Amendment.

(2) In holding that the indictment was not barred by the statute of limitations.

(3) In affirming the judgment of the trial court, and holding that petitioners were afforded a fair trial, despite erroneous and prejudicial rulings, questions and statements of the trial court as follows: (a) the trial court's exclusion from evidence of this Court's decision in *Bridges* v. *Wixon*, *supra*, (b) improper questions put to the defense witness Father Meinecke, and the trial court's subsequent comments

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[5] *Cf. Western Pacific R.R. Corp.* v. *Western Pacific R. Co.*, 197 F. 2d 894, 1013 (9th Cir.), cert. granted 344 U. S. 809, Docket Nos. 150 and 160.

on these questions, (c) the trial court's restriction of the scope of cross-examination of the Government witness Kessler, and its comments, in the presence of the jury, in support of this ruling, and (d) the trial court's instruction to the jury that a reasonable doubt is a doubt for which "a good reason can be given".

REASONS FOR GRANTING THE WRIT

1. *Prior Adjudications.* As the court below put it, with commendable understatement, "the Executive Department has long been concerned with Mr. Bridges" (Tr. 8382). This concern has been manifested in two exhaustive proceedings, prior to this one, in which it was sought to deport him on the basis of a charge of Communist membership or affiliation. Both of these prior efforts were unsuccessful; the first proceeding resulted in an administrative adjudication favorable to Bridges, and the second culminated in the decision of this Court in *Bridges* v. *Wixon, supra.*

Administrative investigations by the Immigration and Naturalization Service in 1934 and 1936 failed to establish Bridges' membership in or affiliation with the Communist Party (Tr. 47, 49). Nevertheless, in 1938 the Secretary of Labor issued a warrant for his deportation on such charges, and a full and lengthy (Tr. 53) hearing was held before a special examiner of the Immigration and Naturalization Service, the Honorable James M. Landis. On December 28, 1939, Dean Landis transmitted to the Secretary of Labor his findings that neither membership in nor affiliation with the Communist Party had been established. The Secretary of Labor approved this determination and cancelled the warrant (Tr. 55).

Thereafter, and consequent upon a statutory amendment making past as well as present membership in or affiliation with the Communist Party a ground for deportation, a new warrant for Bridges' deportation was issued by the Attorney-General in 1941 (Tr. 56-58).[6] Another exhaustive hearing (Tr. 59) was held before the Presiding Inspector (the Honorable Charles B. Sears). Judge Sears found that the evidence established affiliation and membership; the Board of Immigration Appeals found to the contrary, but the Attorney-General found in accordance with Judge Sears' decision, and ordered Bridges deported. Upon his arrest, Bridges sued out a writ of habeas corpus contesting the validity of the warrant. His writ was denied by the District Court (49 F. Supp. 292) and this decision was affirmed (two judges dissenting) by the Court of Appeals for the Ninth Circuit (144 F. 2d 927), but this Court reversed the judgments below, and Bridges was released.[7] He thereupon applied for and obtained naturalization.

The court below refused to give these two prior administrative and judicial determinations the effect of *res judicata* or estoppel. As to the first, it held that "since an administrative board is an instrument of the executive power and not a court, the doctrine of *res judicata* cannot be applied to its decisions" (Tr. 8384), relying on *Pearson* v. *Williams*, 202 U. S. 281. As to the second, it held that in *Bridges* v. *Wixon*, *supra*, "there was no judicial determination that Bridges was not affiliated with nor a member of the Communist Party" (Tr. 8387). Both holdings are

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[6] In the meantime, the Immigration and Naturalization Service had been transferred to the Department of Justice.

[7] The history of these proceedings is summarized in the opinion of this Court in *Bridges* v. *Wixon*, *supra*, at pages 139-40.

erroneous; both are in conflict with applicable decisions of this Court and of other courts of appeals.

With respect to the effect of administrative determinations, *Pearson* v. *Williams, supra,* is not governing here. As the *Pearson* opinion carefully specified, the administrative decision there in question (made by a board of special inquiry of the Commissioner of Immigration) was a tentative and summary one.[8] The Board had no power to compel the attendance of witnesses, and was expected to "decide upon such evidence as is at hand or is readily accessible."[9] In this context, the court stated:[10] "Decisions of a similar type long have been recognized as decisions of the executive department and cannot constitute *res judicata* in a technical sense".

But an entirely different situation is presented when, as here, the administrative proceeding is plenary and of a quasi-judicial character. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. The court below wrongly read *Pearson* v. *Williams, supra,* as a blanket holding that administrative determinations are not given the effect of *res judicata* or estoppel.[11] The courts of appeals are in plain

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[8]The Board's function was to determine, at the moment of the alien's debarkation, whether he was entitled to land. As Justice Holmes remarked, under these circumstances "any inquiry necessarily must be of a very summary sort". *Pearson* v. *Williams, supra,* at p. 284.

[9]*Id.* at page 285.

[10]*Ibid.*

[11]The nature of the misconception below is manifested by the court's observation that Dean Landis was "acting as an official of the executive department of the Government but not as an arm of the judicial department . . .". (Tr. 8383). True, of course, but this applies to all administrative determinations, including those which are quasi-judicial, and the court's test would have subverted the decisions in the *Tait* and *Sunshine* cases, *supra.*

conflict on this question. Thus, in the First and District of Columbia Circuits, the courts of appeals appear to have taken the same position as did the court below. *Cf. Flynn* v. *Ward*, 95 F. 2d 742, 743 (1st Cir.); *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244, 246 (D. C. Cir.). But in the Seventh and Eighth Circuits, a more discriminating result has been reached in line with the decisions of this Court, under which plenary, quasi-judicial determinations are given effect as *res judicata* or by way of estoppel. *International Building Co.* v. *United States*, 199 F. 2d 12 (8th Cir.); *United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (7th Cir.). And the record in the present case leaves no doubt that the proceedings before the special examiners were plenary, and as exhaustive as any court trial.[12]

Turning to the second proceeding, the decision of this Court in *Bridges* v. *Wixon*, *supra*, is a judicial determination based upon an administrative record—i.e., the record of the proceedings before Judge Sears and the reviewing authorities of the Department of Justice. The court below refused to give effect to the decision, on the grounds that "The matter in court was habeas corpus, and the Communist issue was not in the case" (Tr. 8307), and that "there was no judicial determination" (Tr. 8387) that Bridges was not a Communist Party member.

But the lower court's reliance upon the form of the proceeding (habeas corpus) is in direct conflict with the

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[12]Tr. 53-59. The proceedings were protracted, many witnesses were called and exhibits introduced, full argument was heard and briefs received, the factual and legal issues were earnestly contested, and findings and conclusions were made.

law as declared by this Court and other circuit courts of appeals. Where the writ is granted, by a plenary determination on the merits, the decision is *res judicata* of the issues of fact and law necessarily involved in that result. See *Morse* v. *United States*, 267 U. S. 80, 85; *Collins* v. *Loisel*, 262 U. S. 426, 430; *Harris* v. *Biszkowicz*, 100 F. 2d 854 (8th Cir.); *United States* v. *Chung Shee*, 71 F. 277 (D. C. S. D. Cal.); *Ex Parte Reaves*, 121 F. 848 (D. C. Ala.)

The remarkable statement of the court below (Tr. 8387) that "the Communist issue was not in" *Bridges* v. *Wixon*, *supra*, flies in the face of the opinions of this Court and the lower courts in that proceeding. Likewise, the petition for the writ of habeas corpus, and the Government's traverse, put in issue whether there was evidence to support Judge Sears' decision and the Attorney-General's warrant.[13] And this Court clearly held that the record contained no substantial evidence, in support of the charge of Communist Party membership, against Bridges. There is, therefore, a plain basis for application of the rule as stated in *Southern Pacific RR. Co.* v. *United States*, 168 U. S. 1, at p. 48 that ". . . a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies . . .". In the present case the parties (the Federal Government and Bridges) are the same as in *Bridges* v. *Wixon*, *supra*, and the issue (whether Bridges was or was

[13]See Record in *Bridges* v. *Wixon*, *supra*, p. 49.

not a member of the Communist Party) is the same as in that case.[11]

Indeed, the court below conceded (Tr. 8386) that this Court in *Bridges* v. *Wixon*, held "that the administrative decision approving an executive order to deport Bridges could not be sustained since it was not supported by substantial evidence". This Court's judgment in *Bridges* v. *Wixon* was, therefore, far more than a mere finding of unfairness or other irregularity in the administrative proceeding, such as would require a new trial. Courts never decide issues of fact in the philosophic absolute, but only within the framework of the record. When a conviction, or other judicial decision adverse to an individual, is upset on review for lack of supporting evidence, and not merely for unfairness or other irregularity, the determination on review (unless the proceeding is resumed below) is judicially final and is available to the individual to be pleaded as *res judicata*, or estoppel by judgment. The Government cannot repeatedly cast the dice in the hope that a new and distinct proceeding may turn up substantial evidence. *Cf.*

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[11]Below, the Government made some point that Bridges might be shown to have become a Communist *after* the earlier determinations. But this is of no avail to it, as the case did not go to the jury on that basis. The indictment charged, in each count, that Bridges was a member from 1933 to September 17, 1945. At the trial, defense counsel objected unsuccessfully to the introduction of evidence antedating the prior determinations (Tr. 736, 816-17, 87 F. Supp. 14), and unsuccessfully requested instructions to the jury to disregard evidence of membership prior to each significant date in the earlier proceedings (Tr. 293-96). Therefore, even if earlier evidence might have been held admissible to prove a state of facts continuing after the prior determinations, which we by no means concede, the case as it went to the jury was not limited to the question of membership subsequent to the prior determinations. And in fact the bulk of the evidence related to years preceding these determinations. See the opinion below on the evidence by Judge Pope (Tr. 8404-8433).

Scalfon v. *United States*, 332 U. S. 575; *United States* v. *Williams*, 341 U. S. 58, at 63.

We need not here be concerned with what the situation would have been had the Government, after the decision in *Bridges* v. *Wixon*, *supra*, endeavored to resume the administrative proceeding for Bridges' deportation, and to hold another administrative hearing on the same factual issues. *Cf. Bryan* v. *United States*, 338 U. S. 552. The Government did not do so, and it is bound here by *Bridges* v. *Wixon* and the issues of fact therein judicially resolved.

Furthermore, the Government thereafter did not oppose Bridges' naturalization, and did not appeal from the decree granting him citizenship. That decree, itself, is also *res judicata* of the issues of fact necessarily decided, including that of non-membership in the Communist Party.[15]

Administrative decisions in recent years have often assumed proportions momentous to individuals. Deportation proceedings are perhaps the plainest example. See *Bridges* v. *Wixon*, *supra*, at p. 147. Although the prior proceedings against Bridges were not technically criminal in character, they were certainly penal. *Ng Fung Ho* v. *United States*, 259 U. S. 276; *Wallis* v. *Vecchio*, 65 F. 2d 250 (5th Cir.); *Broome* v. *Zurbrick*, 45 F. 2d 931 (6th Cir.). The Fifth Amendment forbids double jeopardy as to even a trifling criminal offense. Its guaranty of due

[15]The question of the binding effect of a naturalization decree, as to past facts, was expressly left open in *Knauer* v. *United States*, 328 U. S. 654. However, the Court did restate (at p. 670), with apparent approval, the rule that "the issue of fraud can become *res judicata* in the judgment sought to be set aside", and sharply distinguished the issue of *state of mind* (involved in the *Knauer* case) from issues as to *past facts* (involved in this case), as to which (at p. 671) "opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false."

process of law extends at least the basic protections of the Bill of Rights to all types of proceedings, whether or not known in 1789. Unless the constitutional guaranty against double jeopardy is "to be eroded away by a tide of plausible-appearing exceptions" (Justice Murphy in *Wade* v. *Hunter*, 336 U. S. 684, 694), it must be held applicable to cases such as the one at bar.

Under the decision below, the Government can follow one protracted and exhaustive proceeding with another. If that can be done, there will inevitably come a proceeding, whether it be the second or the seventh, when the Government may get the result it wants. The entire course of proceedings with respect to Bridges embodies repetitious charges based upon the same factual issue, disregard of the salutary policy of repose, and harassment of an individual on the same charge over the course of fifteen years or more. This cannot be squared either with rudimentary concepts of fair play, or with the Fifth Amendment. This Court should examine "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *See Adamson* v. *California*, 332 U. S. 46, 67-68. *Cf. Snyder* v. *Massachusetts*, 291 U. S. 97, 105; *Francis* v. *Resweber*, 329 U. S. 459, 469.

2. *Statute of limitations.* This proceeding was barred by the general federal statute of limitations (18 U. S. C. 3282) unless the Wartime Suspension of Limitations Act (18 U. S. C. 3287) is applicable.[16] The court below held

[16] In its original opinion of September 6, 1952, the court below held that Counts II and III were also saved by the "rights and liabilities" clause in the Act of June 25, 1946, which repealed the five-year limitation previously applicable to the offenses charged in these counts. (Tr. 8225-8229). In its amended opinion of November 18, 1952, the court below held to the contrary (Tr. 8364-8367).

the latter Act applicable, expressly recognizing (Tr. 8379) that its decision was in direct conflict with *Marzani* v. *United States*, 168 F. 2d 133 (D. C. Cir.), twice affirmed by an equally divided Court, 335 U. S. 895 and 336 U. S. 922.[17]

The Wartime Suspension Act suspended until three years after the termination of hostilities (proclaimed by the President December 31, 1946) the running of the statute of limitations applicable to offenses "involving fraud or attempted fraud against the United States or any agency thereof, whether by conspiracy or not."[18] This language is substantially identical with that contained in the similar statute enacted after World War I (November 17, 1921, c. 124, Sec. 1, 42 Stat. 220), which suspended the limitation on "any offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner."

By a series of unanimous decisions of this Court, it became the settled construction of the 1921 statute that it applied only where fraud was a necessary element of the statutory crime charged. *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Scharton*, 285 U. S. 518. Even if the acts of which the defendants stood accused clearly involved fraud in a general sense, the 1921 Act was inapplicable unless the criminal statute explicitly made fraud an essential ingredient of guilt. Thus, in the *Noveck* case, an

[17]The existence of the conflict was also recognized in *United States* v. *Skinner*, 194 F. 2d 598, 599 fn. 1 (3rd Cir.), and *Bridges* v. *United States*, 184 F. 2d 881, 883-84.

[18]Two other categories of offenses covered in the Wartime Suspension Act were concededly not applicable in this proceeding.

indictment for perjury was barred, even though it consisted of a false statement of income to defraud the government of tax revenues, because fraud was not a necessary element of the crime of perjury. In the *Scharton* case,[19] the court went further, and declared (285 U. S. at p. 522) that such statutes should be "liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses."

In the light of this interpretive history, Congress enacted the Suspension Act involved in this proceeding. The legislative history is barren of any evidence that Congress intended or attempted to undo or modify the rules of interpretation previously laid down by this Court, or in any way to expand the new statute's coverage. Furthermore, the House and Senate Committee reports strongly indicate that the legislative intent was to suspend the limitation on frauds of a pecuniary nature committed in connection with the war,[20] quite different from the offenses here charged.

The substantive offense with which petitioner Bridges is charged (Count II) is making a false statement in a naturalization proceeding. It is patent on the face of the statute that fraud is not an essential element of the statutory crime. The *Nowcek* and *Scharton* cases are directly in point, and the Suspension Act does not apply. The decision below is plainly wrong, and is in conflict not only with *Marzani* v. *United States*, *supra*, but also with *United*

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[19] The *Scharton* case construed a proviso in the Revenue Act of 1926, Sec. 1110(a), similar in language to the 1921 statute.

[20] No. 2051, House Misc. Rep. III, and No. 1544, Sen. Misc. Rep. IV (77th Cong. 2d Sess.).

States v. *Obermeier*, 186 F. 2d 243 (2nd Cir.), wherein the Act was held inapplicable to a charge identical to the one herein question. As the Court of Appeals for the Second Circuit concluded, the Act applies[21]

> ". . . only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense' and does not, absent such a statutory definition, apply to perjury or false swearing even when the United States is directly interested. Nothing in 8 U. S. C. § 746(a)(1),[21a] under which the defendant was indicted, makes fraud an ingredient of the crime."

The *Marzani* case held that the Suspension Act applies only to pecuniary frauds, and under this decision the Act is equally inapplicable to Counts I and III of this indictment, and they are barred. Other reasoning leads to the same result. Count I is cast in the language of conspiracy to defraud, but the acts alleged constitute only a conspiracy to have Bridges make a false statement in a naturalization proceeding. Similarly, Count III charges petitioners Robertson and Schmidt with assisting Bridges to obtain a Certificate of Naturalization, by means of a false statement. If fraud is not an essential element of the false statement, it can hardly be an element of the conspiracy or of the assistance. This reasoning was the basis of this Court's decision in the *McElvain* case, *supra*, where the defendant was indicted under the same statute on which Count I of the present indictment is based. The Court held that the earlier Suspension Act did not cover the conspiracy because

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[21] *United States* v. *Obermeier*, *supra*, at page 257. The opinion of Judge Frank was concurred in by Judges Learned Hand and Swan.

[21a] Now 18 U. S. C. 1015 (a), on which Count II of this indictment is based.

the substantive offense, to which the conspiracy was directed, was not covered.[22]

The decision in the *Marzani* case also appears to have been confirmed by this Court's dictum in *United States* v. *Beacon Brass Co. Inc.*, 344 U. S. 43.[23] Indeed, the decision below, holding the Suspension Act applicable, is so bereft of support in precedent or logic that a district court in California has recently refused to follow it. *United States* v. *Grainger* (N. D. Cal.), decided December 5, 1952.[24]

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[22] *United States* v. *Gottfried*, 165 F. 2d. 360 (2nd Cir.), heavily relied on by the court below, involved both conspiracy and the substantive offense of false statements made to the Office of Price Administration in connection with sugar rationing. The Suspension Act was held applicable, but the decision seems to have been doubted in the later *Obermeier* case, in the same court (186 F. 2d at p. 257, footnote 64). Furthermore, the crime involved was more in the nature of a "wartime offense", to which the Suspension Act was thought peculiarly applicable. See, in this connection, the concurring opinion of Mr. Justice Clark in *United States* v. *Smith*, 342 U. S. 225, 230-31.

[23] Referring to the statute involved in the *Marzani* case (the False Claims Act), this Court, *per* Mr. Justice Minton, stated at 344 U. S. p. 45: "Obviously, at the times of the indictments here, the three-year limitation period, 18 U. S. C. (Supp. V) Sec. 3282, for violations of this statute had expired as to statements made in October 1945." See also *United States* v. *Anzalone*, 197 F. 2d 714 (3rd Cir.).

[24] As in the *Gotfried* case, *supra*, the defendants in the *Grainger* case were indicted under both the False Claims Act and the general conspiracy statute on which Count I of the indictment here is based. The district court (Lemmon, D. J.) held all counts barred and the Suspension Act inapplicable, on the basis of the *Scharton*, *Marzani* and *Beacon Brass* cases, *supra*. Referring to the opinion below in the present case, the court stated:

> ". . . It should be observed, however, that in its *Bridges* opinion, our appellate court did not evaluate the force of the word 'denominated' in the *Scharton* case; that in criticizing the 'conclusions' of the Court of Appeals for the District of Columbia in the *Marzani* case, *supra*, the Ninth Court of Appeals did not consider the fact that *Marzani* had twice been affirmed, though by a divided Supreme Court; and finally, our Court of Appeals apparently overlooked the *Beacon Brass* case, *supra*.
>
> "This Court, therefore, must though reluctantly, disregard the holding in *Bridges*, and be guided by the Supreme Court's recent semaphores in *Scharton*, *Marzani*, and *Beacon Brass*."

Finally, the question here at issue is an important one, as the Government earnestly maintains in its petition for allowance of an appeal to this Court in the *Grainger* case, *supra*.[25] Another question of construction of the Suspension Act has recently been brought before this Court by the Government's petition for certiorari in *United States* v. *Klinger*, 199 F. 2d 645 (2nd Cir.). All the observations therein with respect to the importance of the matter[26] are applicable to this case, and underline the desirability of settling the conflict created by the court below.

3. *Denial of Fair Trial.* A. The Court below affirmed the exclusion from evidence of this Court's opinion in *Bridges* v. *Wixon*, which Robertson and Schmidt had offered to support their vouching for Bridges in the naturalization proceedings. It said the opinion could not have been explanatory of their beliefs "because of the nature of the issue involved in the case and the narrow scope of the decision (Tr. 8388)". But these petitioners had the right to have the jury determine the reasonableness of their beliefs

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[25]See the matter under the heading "The Question is Substantial" in the Government's petition in that case, filed January 2, 1953 in the District Court for the Northern District of California. Therein the Government also concedes that the decision below in this case is in conflict with the *Marzani* and *Obermeier* cases, *supra*.

[26]See pages 7 to 8 of the Government's petition in No. 527. In the *Klinger* case, the question at issue is whether the *bar* of the statute is suspended until December 31, 1949, or whether the *running* does not begin until that day, creating in effect a six-year period. *Cf. United States* v. *Smith*, 342 U. S. 225. The Government's petition points out that there are well over one hundred prosecutions in which indictments have been filed but which have not yet been brought to trial, and that the Suspension Act has now become permanent legislation, so that definitive construction by this Court is desirable. *Cf.* Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (January, 1953), *passim*.

by an examination of the document upon which they claimed those beliefs were predicated. *Potter* v. *United States*, 155 U. S. 438; *Harrison* v. *United States*, 200 F. 662 (6th Cir.); *Buchanan* v. *United States*, 15 F. 2d 496 (8th Cir.); *Hersh* v. *United States*, 68 F. 2d 799 (9th Cir.); *Miller* v. *United States*, 120 F. 2d 968 (10th Cir.); *C. I. T. Corporation* v. *United States*, 150 F. 2d 85 (9th Cir.). The exclusion of this evidence was prejudicial error. *Cf. Kotteakos* v. *United States*, 328 U. S. 750.

B. Father Paul Meinecke, a Catholic priest, was called as a character witness by Bridges. At the conclusion of his examination by counsel, the trial court undertook an examination which tended to discredit the witness.[27] Questions were put which indicated that the witness was mentally unbalanced (Tr. 4380-1). The court below admitted that "the questions of the [trial] court might be subject to misunderstanding" (Tr. 8393), but went on to say that such a danger was cured by a subsequent instruction. In fact, no subsequent instruction to disregard the implications of the questions was given. Rather, the trial judge said he was seeking to provide the jury with "all the facts surrounding the Father" (Tr. 4387). This indicated that there were "facts" concerning the witness' mental health which the jury ought to consider, and if anything this compounded the evil. Similar conduct on the part of a trial judge has heretofore resulted in setting aside convictions. *United States* v. *Brandt*, 196 F. 2d 653 (2nd Cir.); *Williams* v.

[27] Shortly prior to doing so the trial court had declined an invitation of defense counsel to assist in overcoming technical objections put by the prosecutor during the direct examination of this very witness with the observation that "It is not the province of the court to examine the witness" (Tr. 4369-70).

United States, 93 F. 2d 685 (9th Cir.); *cf. Kotteakos* v. *United States, supra.*

C. The trial court improperly limited cross-examination of Kessler, a key prosecution witness. An earlier witness had placed Bridges at an alleged Communist Party meeting, and had fixed the time as an occasion when he (the witness) had stopped at a specified hotel in San Francisco *"late in 1940"* (Tr. 3343). Subsequently, the Government asserted that this was the "only registration" of the witness at the hotel in question for the year 1940 (Tr. 3481). The defense thereupon produced a registration card dated in *February* 1940—the only one it found in the hotel records.

In order to remove this cloud upon its witness, the Government called Kessler, an employee of the Immigration and Naturalization Service, who produced another registration card dated in *August* 1940, with the explanation that the Government had earlier removed this card from the hotel files.

The trial court should have permitted an unhampered cross-examination of this Government employee to determine why and under what circumstances the second registration card had been removed.[28] However, disregarding this Court's decision in *Alford v. United States*, 282 U. S. 687, the trial court permitted no cross-examination on this point (Tr. 3580-3602). This was a prejudicial abuse of discretion which "cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a

[28]Earlier government witnesses who had fixed a precise date when they claimed to have seen Bridges in New York City at an alleged Communist meeting were confronted with documentary and other evidence which, as the court below recognized, established "apparently beyond controversy" (Tr. 8428) that he was three thousand miles away in California at that time. The caution thereafter exhibited by the Government in fixing precise dates was understandable.

reasonable cross-examination". *Alford* v. *United States, supra,* at p. 694.

In connection with this incident, the trial court made highly prejudicial observations in the presence of the jury.[29] The court below recognized this as being "in poor discretion" (Tr. 8397) and as not reflecting the "true idealism" with which a trial judge should act (Tr. 8397). But it is far more than that. Standing by itself, it would justify a reversal. Together with the other errors, it compels one. *Kotteakos* v. *United States, supra; Krulewitch* v. *United States,* 336 U. S. 440; *Kraus & Bros.* v. *United States,* 327 U. S. 614; *Fiswick* v. *United States,* 329 U. S. 211; *United States* v. *Levi,* 177 F. 2d 833 (7th Cir.); *Meeks* v. *United States,* 163 F. 2d 598 (9th Cir.); *Wolcher* v. *United States,* F. (2) (9th Cir.), decided November 17, 1952.

D. The trial judge told the jury that petitioners were entitled to acquittal if the Government failed to prove their guilt beyond a reasonable doubt, but also instructed that such a doubt was one "for which a good reason can be given" (Tr. 7885-6). This put upon petitioners the burden of satisfying the jury that there was a good reason for their acquittal. The court below itself recognized that such an instruction is "not to be commended" (Tr. 8399).

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[29] In the course of ruling upon the point, the trial judge said:

"Then in Morton v. U. S. at 60 Fed. 2d 696, at 699. And the language used in this Morton case is somewhat reminiscent of your [addressing trial counsel] expectation or hope that some error might be created in the record. The Court said * * *

'The battle continued, not to ascertain the truth, but in the evident hope that error might be injected into the record and ultimate conviction thereby avoided. But avoidance of a conviction upon uncontradicted evidence, establishing to a certainty the guilt of the accused, . . . and so forth.'"

The circuits are not in agreement on the reversibility of an instruction to the effect that a reasonable doubt means a doubt for which a reason can be assigned. *Cf. United States* v. *Farina*, 184 F. 2d 18 (2nd Cir.) (see especially Judge Frank's dissenting opinion at pp. 21-24); *Pettine* v. *Territory of New Mexico*, 201 F. 489 (8th Cir.). But never has it been suggested that not only must an affirmative reason be assigned to warrant an acquittal, but that the reason must be a "good" one. Standing alone this error would require reversal of the convictions. *Bihn* v. *United States*, 328 U. S. 633; *Bollenbach* v. *United States*, 326 U. S. 607. Compounded as it is with other errors of the trial court, the convictions cannot stand. *Cf. Kotteakos* v. *United States*, *supra*, and *Krulewitch* v. *United States*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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January, 1953.

APPENDIX

18 U. S. C. Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy; each of the parties to such conspiracy shall be fined not more than $10,000., or imprisoned not more than two years, or both."

18 U. S. C. Section 1015 (a):

"Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens * * * shall be fined not more than $5,000. or imprisoned not more than five years, or both."

8 U. S. C. (1946 ed.) Section 746 (a):

"It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise * * *

(5) To encourage, aid, advise, or assist any person not entitled thereto to obtain, accept, or receive any * * * certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or of citizenship—

a. Knowing the same to have been procured by fraud; or

b. Knowing the same to have been procured by the use or means of any false name or false

statement given or made with intent to procure the issuance of such * * * certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or citizenship * * *"

18 U. S. C. Section 3282:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

18 U. S. C. Section 3287:

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontracted, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section."